MUSTAPAH PUTEH *a*

v.

BASIT MOHAMMAD

HIGH COURT MALAYA, MELAKA *b*
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-28-1998]
11 JANUARY 1999

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Apportionment of liability and quantum of damages - Fatal accident - Plea of res ipsa loquitur by appellant - No specific rebuttal by respondent - Insufficiency of evidence adduced by appellant - Finding of trial judge that respondent only 50% liable - Whether trial judge justified in the circumstances - Quantum of damages - Failure of respondent to disprove monthly earnings and expenses of deceased - Whether findings by trial judge correct* *c* *d*

TORT: *Negligence - Res ipsa loquitur - No specific rebuttal by defence - Whether finding that defence only 50% liable justified*

The appellant had commenced an action under s. 7(3)(iv)(d) of the Civil Law Act 1956 for loss of support against the respondent. The appellant's son, who was riding a motorcycle, collided with the respondent who was also riding a motorcycle. As a result of this, the appellant's son ('deceased') died. At the trial court, the appellant pleaded the maxim *res ipsa loquitur* and adduced only one witness, *ie*, the investigating officer, who supplied some idea as to the place of the accident. The respondent did not rebut the said plea. The trial judge found the respondent 50% liable. *e* *f*

In this instance, the appellant appealed against the decision of the trial judge. The appellant claimed that the trial judge should have found the respondent 100% liable as the said plea of *res ipsa loquitur* was not rebutted by the respondent. *g*

Held:

[1] The scantiness of the evidence adduced by the appellant was evident. However, the trial judge had no choice but to adjudicate primarily on the plaintiff's evidence. It is trite law that if the defence does not produce any evidence to rebut the plaintiff's case, then the latter's evidence must be accepted. *h*

[2] It would have been clearly wrong for the trial judge to consider the maxim of *res judicata* in isolation. All evidence available must be assessed and *i*

considered in totality. Further, there was no legal impediment to prevent the trial judge from seeking recourse from the plaintiff's very own evidence for guidance prior to his final adjudication.

[3] Based on the relevant sketch plan, the 50% liability apportionment was not unreasonable. Also, the much more extensive damages from the deceased's motorcycle must have precipitated the trial judge to conclude that the latter was not totally blameless.

[4] As for damages, the quantum findings of the trial judge was modified to take into account the failure of the respondent to disprove the monthly earnings of the deceased, or discredit the truth of the appellant's receipt of money from the deceased monthly, and/or his monthly expenses.

[Appeal dismissed as to liability; quantum modified.]

Case(s) referred to:
Barkway v. South Wales Transport Co Ltd [1950]1 All ER 392 ***(refd)***
Che Jah Mohamed Ariff v. CC Scott [1952] 18 MLJ 69 ***(refd)***
Fatimah Derakman v. Wan Jusoh Wan Kolok & Anor [1994] 4 CLJ 537 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(refd)***
Moore v. R Fox & Sons [1956] 1 QB 596 ***(refd)***
Ngooi Kim Chong v. Subramaniam Maruthan & Anor [1990] 1 CLJ 799 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)(iv)(d)

Other source(s) referred to:
Black's Law Dictionary, 6th, edn, p 1305
Dictionary Of Law, LB Curzon, 4th edn, p 334
Jowitt's Dictionary Of English Law, 2nd edn, p 1557

For the appellant - Joshua T Sambanthan; M/s Lawrence Pereira & Partners
For the respondent - Vimalarani Sothiratnam; M/s Taye & Co

Reported by Izzaty Izzuddin/Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

On 25 January 1997 at about 9.30p.m., a collision occured between the appellant's son, who was riding motorcycle No. WBX 9587 and the respondent who rode motorcycle No. NAM 183. As a result of that accident, the appellant's son (hereinafter called "the deceased") died. The appellant subsequently commenced an action under s. 7(3)(iv)(d) of the Civil Law Act

1956 (Act 67) against the respondent. In his pleadings the appellant, *inter alia*, pleaded the maxim of *res ipsa loquitur*. In his defence, for some unknown reason, the respondent made no specific reply against this plea.

At the hearing, as regards the accident proper, the appellant adduced only one useful witness, *ie*, the investigating officer, to supply some idea of the place of accident. Sadly, his role was restricted merely to the tendering of the relevant sketch map. The scantiness of the evidence adduced by the appellant was evident, as not even the travelling direction of the deceased and the respondent was successfully divulged. The defendant not unreasonably, assumed that the appellant had not successfully made out a *prima facie* case, and correspondingly elected not to call any witness. In law, the effect of this election is that, in the event the judge accepts the plaintiff's evidence, then the defendant is disallowed from calling any rebuttal evidence. Indisputably, it must have been due to the acceptance by the Sessions Court Judge of the plaintiff's case, that the case determined abruptly. Thenceforth the learned judge had no choice but to adjudicate primarily on the plaintiff's evidence. It is trite law that if the defence does not produce any evidence to rebut the plaintiff's case, then the latter's evidence must be accepted (*Fatimah Derakman v. Wan Jusoh Wan Kolok & Anor* [1994] 4 CLJ 537).

The repercussion of this foolhardy course of action, *ie*, the election, was that a 50% liability finding was pronounced against the respondent by the judge. At the conclusion of the appeal before me, I concluded that the Sessions Court Judge must have been satisfied of the partial success of the plaintiff, in adducing some evidence of the respondent's culpability. The explanation will follow later. This generous finding of 50% liability against the respondent, and the issue of quantum, did not find favour with the appellant as a notice of appeal was filed by him subsequently. Before me, he canvassed that the Sessions Court Judge should have found the respondent 100% liable, as the plea of *res ipsa loquitur* was never rebutted by the respondent.

Having heard the appeal, I left the liability finding undisturbed, though not the quantum. I modified the quantum by making these changes, namely:

1. RM26,880 for the dependancy claims compared to the outright rejection of the general damages by the Sessions Court Judge. This sum was derived after deducting RM320 (expenses of appellant) from RM600 received from the deceased, which left RM280 and thereafter multiplying it with the multiplicand of eight years (96 months). Mathematically, it will appear thus:

RM280 x 8 x 12 = RM26,800;

2. RM1,500 for the burial expenses;

3. RM20 for the search expenses;

4. RM50 for documents; and

5. costs.

The deliberation of the maxim of *res ipsa loquitur*, took up much of the court's time during the appeal, as the appellant's counsel continuously and doggedly pressed home this point. In brief, he postulated that the learned Sessions Court Judge never took this maxim into consideration, as otherwise he would not have adjudicated this percentage. *Res ipsa loquitur*, in simple English means "the thing speaks for itself", and is part of the rule of evidence. Simply put, when a plaintiff raises this maxim, the mere fact that an accident had occurred, must raise the inference of the defendant's negligence, and as such a *prima facie* case has been proved (*Dictionary Of Law*, 4th Edn, by LB Curzon at p. 334). *Jowitt's Dictionary Of English Law*, 2nd Edn, at p. 1557, explains *res ipsa loquitur* in the following terms:

> ... that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant, or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety (per Megaw LJ in *Lloyds v. West Midlands Gas Board* [1971] 1 WLR 749 (gas explosion injuring householder).)

Reverting to this maxim, "the thing" must mean the relevant collision that occured on 25 January 1997. And the presumption that arose was that the accident was totally contributed by the negligence of the defendant. This presumption, on the other hand is rebuttable fully or partially. At the earliest of stages, I must reiterate that, as this maxim is merely a rule of evidence, the onus that has shifted to the respondent, only relates to that piece of evidence (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509). It must be borne in mind that the burden of proof, regarding the whole case never shifts but remains throughout on the shoulders of the plaintiff, *ie*, the appellant here. The consequential question for determination therefore would be, whether the defendant had succeeded in disproving that presumption of negligence fully or partially, or had given an explanation of the cause of accident, which did not connote negligence by him (*Black's Law Dictionary*, 6th Edn, p. 1305; *Moore v. R Fox & Sons* [1956] 1 QB 596). If the defendant does succeed in the accepted legal sense, then it means the burden has shifted back to the plaintiff, who then will have to prove the

defendant's negligence by some other manner. Jobling J In *Che Jah Mohamed Ariff v. CC Scott* [1952] 18 MLJ 69, had occasion to say:

> From all these cases it is quite clear that in a case of *res ipsa loquitur* the onus is thrown on the defendant to give a reasonable explanation as to how the accident occured. If defendant gives a reasonable explanation the onus is then thrown back on the plaintiff to prove negligence.

At the close of the defendant's case, in this case the respondent's, the judge, as in any civil case, must assess the case as a whole, and then conclude whether the plaintiff has proven his case.

Perusing the evidence, I could not but conclude that if the Sessions Court Judge had not taken into consideration the plea of *res ipsa loquitur*, then the appellant's case would have been dismissed outright. Certainly no apportionment of liability would have ensued. As it were, it must have been after deciding that *res ipsa loquitur* did apply, having borne in mind its "rule of evidence" effect, conclude that the liability of the respondent had been diluted by half due to the contents of the sketch plan. It wound have been clearly wrong for the Sessions Court Judge to consider the maxim of *res ipsa loquitur* in isolation. This is so, as all the available evidence must be assessed and considered in totality (*Ngooi Kim Chong v. Subramaniam Maruthan & Anor* [1990] 1 CLJ 799). No doubt the respondent could have helped, as he survived that collision, unlike the appellant who was never at the scene (*Barkway v. South Wales Transport Co Ltd* [1950]1 All ER 392, 399). Unfortunately this was not to be, due to the respondent's unfortunate election. On the other hand, there is no legal impediment known to law that could prevent the Sessions Court Judge from seeking recourse from the plaintiff's very own evidence, for guidance prior to his final adjudication.

That 50% liability apportionment was not unreasonable, as the sketch plan showed that both the motorcycles were found somewhere at the left and middle portion of the road. No explanation surfaced as to why the road was not delineated by any broken continuous line. The position of the glass strewn around the motorcycles, were of no help either, as the place of impact of the vehicles need not necessarily be the very spot where the broken glasses had collected. Whether by the law of physics or logic, after a collision, the shattered glass would invariably be flung and scattered some distance away from the place of impact.

The damages to both the motorcycle may have played a major role in persuading the Sessions Court Judge in not completely exonerating the deceased of some contributive liability. The much more extensive damages detected from the deceased's motorcycle, as testified by PW1, must have

precipitated the judge to conclude that the latter was not totally blameless. It could be indicative of the deceased having ridden faster than the respondent, and then suffering the indignity of having been flung further away comparatively after the collision, hence those damages and the liability findings.

As regards the quantum, I was surprised at the manner and the amount adjudged by the presiding judge, inspite of the non-too convincing cross-examination by the respondent, particularly on the issue of the income and expenses of the deceased and the appellant respectively. It was crystal clear that the deceased earned about RM1,200 – RM1,500 per month, as evinced by the testimony of PW2 at p. 47, and of PW3 at p. 50. The cross-examination of the appellant's witnesses failed to disprove the monthly earnings of the deceased, or discredit the truth of the appellant's receipt of RM600 from the deceased monthly, and or his monthly expenses of RM320.

To regurgitate, due to those failures it was thus highly necessary for me to only disturb the judge's finding as regards the issue of quantum and no more, with costs.